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February 15, 2011

AGENDA ITEM 4a

TO: MEMBERS OF THE BENEFITS AND PROGRAM ADMINISTRATION COMMITTEE

- I. SUBJECT:** Policy for Proposed Decisions from the Office of Administrative Hearings
- II. PROGRAM:** Administration
- III. RECOMMENDATION:** That the Committee recommends:
- That the Board adopt the Policy as set forth in Attachment A; and
 - That the Board retain external legal counsel to advise the Board in connection with Proposed Decisions

IV. ANALYSIS:

The proposed policy (Policy) sets forth the procedures under which the California Public Employees' Retirement System (CalPERS) will present proposed decisions (Proposed Decisions) of the Office of Administrative Hearings (OAH) to the Board of Administration (Board). The goal of the Policy is to ensure that the CalPERS review process for Proposed Decisions provides procedural fairness to all parties, avoids even the appearance of impropriety or improper influence, preserves neutrality of all Board decisions and provides a process for the Board to obtain neutral legal advice when needed on substantive or procedural legal issues arising during the review of any Proposed Decision. The Policy is set forth as Attachment A.

A. Background

By way of background, the Board's existing written policy for procedures related to the review of Proposed Decisions dates back approximately 25 years. The proposed Policy will update the old policy by incorporating into one written policy all existing practices that have evolved since the Board's adoption of the old policy.

When disputes arise over the interpretation of the Public Employees' Retirement Law (PERL), Public Employees' Medical and Hospital Act (PEMHCA), or other laws or programs administered by CalPERS, or over an individual's CalPERS eligibility for benefits, CalPERS utilizes an administrative hearing process to resolve these disputes. This process is conducted in accordance with the Administrative Procedures Act and the Board's procedural regulations to adjudicate such disputes.¹ Pursuant to these statutes and regulations, matters are referred to the OAH for an administrative hearing. The administrative hearings are presided over by a neutral Administrative Law Judge (ALJ). After completing the evidentiary hearing process, the ALJ forwards his or her Proposed Decision to CalPERS for Board review and action.

The Board's existing practice for considering Proposed Decisions was adopted in November of 1985 in an effort to comply with a Formal Opinion of the Standing Committee on Professional Responsibility and Conduct of the State Bar (State Bar Opinion), which provided that adjudicatory hearings conducted by an administrative agency (such as CalPERS) are subject to a limit on communications between the adverse parties on the one hand and the judge or official before whom the proceeding is pending, on the other. As applied to CalPERS, it was determined that the State Bar Opinion generally meant that neither CalPERS attorneys and staff nor opposing attorneys and parties could communicate with the Board about a case from the time a dispute began until the Board decided the case, unless the communication was authorized under the rules relating to ex parte communications.

After considering several different alternatives, the Board adopted a policy prohibiting oral arguments by any party at the time the Board considered a Proposed Decision. Instead, the Board's policy allows all parties to submit simultaneous written arguments for Board consideration.² At the time this procedure was implemented, each party was allowed to submit a three page written argument. In December of 1993, this practice was revised to allow written arguments of up to six pages.

B. The Proposed Policy

The proposed Policy outlines the procedures to be followed from the time a Proposed Decision is received from OAH through the time the Board considers and takes action on a Proposed Decision. After receiving a Proposed Decision, the Policy provides that CalPERS staff will notify all parties of the Proposed Decision within a reasonable time but not later than 30 days from CalPERS

¹ See Gov. Code sections 11500 et. seq and Cal. Code regs., title 2, sections 555.1 – 555.4.

² A copy of the November 20, 1985 Agenda Item 22 is included as Attachment B to this agenda item.

receipt of the Proposed Decision. The parties will be notified that the Proposed Decision has been calendared for action before the Board and provided instruction on how to submit written arguments for consideration by the Board.

CalPERS staff will prepare and present an agenda item to the Board for consideration during the course of its regularly scheduled meetings. The proposed Policy provides that agenda items will include the following four main components:

- A copy of the Proposed Decision;
- A brief factual procedural summary of the case;
- Written arguments received from the advocates representing all parties in the case; and
- A description of the alternatives available to the Board relative to the Proposed Decision.

These agenda items will be signed by the Assistant Executive Officer for the Division from which the case arose; however the agenda items will no longer include staff's recommended action on the Proposed Decision. The CalPERS staff attorney assigned to the matter will prepare and sign staff's written argument, and the argument will be included with the agenda item, along with all other written arguments submitted by the advocates for all other parties to the case.

At its meeting, the Board will decide whether to adopt the Proposed Decision as its own, make technical or minor changes and adopt the Proposed Decision at its own, reject the Proposed Decision and decide the matter itself from the record (i.e. conduct a full Board hearing), or reject the decision and remand the matter back to the ALJ for the taking of more evidence.

C. Board Retention of External Legal Counsel

Under the Board's existing policy, CalPERS legal staff is not permitted to provide the Board with substantive legal advice in connection with any pending Proposed Decision. As a result, there have been instances during Board meetings when a Board member has had a substantive question about a Proposed Decision, the CalPERS legal staff was precluded from answering the question, and the Board member's question was not answered.

In order to improve the procedures for the Board's consideration of Proposed Decisions, staff recommends that the Board direct the CalPERS legal staff to retain outside counsel to provide legal advice to the Board on substantive and procedural legal issues that may arise during the Board's consideration of and action on Proposed Decisions.

The Policy includes provisions regarding the role and use of the Board's counsel. It provides that the Board may adjourn into closed session to discuss the merits of a Proposed Decision or to discuss legal issues with outside counsel prior to taking action on any Proposed Decision. In addition, the Policy provides that all advice provided to the Board by outside counsel will be provided at the meeting of the Board and in the presence of all Board members attending the meeting. Consistent with the CalPERS Statement of Governance Principles, any legal advice provided to one Board member will be provided to all Board members, and no individual Board member will contact outside counsel directly, either verbally or in writing, to seek advice or guidance relative to any Proposed Decision outside a meeting of the Board.

Finally, the Policy provides that any legal advice rendered under the Policy will be subject to all privileges and protections, including but not limited to the attorney client privilege and attorney work product doctrine, applicable under relevant law.

V. STRATEGIC PLAN:

This item supports several goals, including: Goal II - Foster a work environment that values quality, respect, diversity, integrity, openness, communication, and accountability; Goal VI - Administer pension benefit services in a customer orientated and cost effective manner; and Goal X - Develop and administer quality, sustainable health benefit programs that are responsive to and valued by enrollees and employers.

VI. RESULTS/COSTS:

There will be additional costs associated with this new policy for the services performed by outside counsel and for minimal costs related to changes in staff procedures and forms.

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